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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 559

**HANS PETE MORTENSEN AND LORRAINE MORTENSEN,
PETITIONERS**

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH
CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 79-84) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered on November 23, 1943 (R. 85). The petition for a writ of certiorari was filed on December 27, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of

the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the trial judge or the circuit court of appeals erred in denying petitioners' applications for an extension of time to present and settle a bill of exceptions.

2. Whether, assuming that the question is properly before the Court, the interstate transportation of prostitutes on the return portion of a vacation trip with the intent to have them resume the practice of prostitution in the brothel operated by petitioners was a violation of Section 2 of the Mann Act.

STATUTE AND RULES INVOLVED

Sections 1 and 2 of the Act of June 25, 1910, c. 395, 36 Stat. 825 (18 U. S. C. 397, 398), known as the Mann Act, provide in part:

SEC. 1. The term "interstate commerce," as used in this Act, shall include transportation from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, * * *

SEC. 2. Any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any Territory or in the District of Columbia, any woman or girl for the purpose of prostitution or

debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; * * * shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court.

Rules IV, VII, and IX of the Criminal Appeals Rules promulgated by this Court May 7, 1934 (292 U. S. 663-665), provide:

RULE IV. The clerk of the trial court shall immediately forward the duplicate notice of appeal to the clerk of the appellate court, together with a statement from the docket entries in the case substantially as provided in the form hereto annexed.

From the time of the filing with its clerk of the duplicate notice of appeal, the appellate court shall, subject to these rules, have supervision and control of the proceedings on the appeal, including the proceedings relating to the preparation of the record on appeal. * * *

Rule VII. The clerk of the trial court shall immediately notify the trial judge of the filing of the notice of appeal, and thereupon the trial judge shall at once direct the appellant or his attorney, and the United States Attorney, to appear before him and

shall give such directions as may be appropriate with respect to the preparation of the record on appeal, including directions for the purpose of making promptly available all necessary transcripts of testimony and proceedings. The action and directions contemplated by this Rule may be had and given by the trial judge at any place he may designate within the judicial district where the conviction was had.

Rule IX. In cases other than those described in Rule VIII, the appellant, within thirty (30) days after the taking of the appeal, or within such further time as within said period of thirty days may be fixed by the trial judge, shall procure to be settled, and shall file with the clerk of the court in which the case was tried, a bill of exceptions setting forth the proceedings upon which the appellant wishes to rely in addition to those shown by the clerk's record as described in Rule VIII. Within the same time, the appellant shall file with the clerk of the trial court an assignment of the errors of which appellant complains. The bill of exceptions shall be settled by the trial judge as promptly as possible, and he shall give no extension of time that is not required in the interest of justice. * * *

STATEMENT

Petitioners, who are husband and wife (see R. 59), were indicted in the United States District Court for the District of Nebraska in two counts

charging violations of Section 2 of the Mann Act (*supra*, pp. 2-3), in that they transported and caused to be transported and aided and assisted in obtaining transportation for and in transporting two women in interstate commerce from Salt Lake City, Utah, to Grand Island, Nebraska, for the purpose of prostitution and debauchery and with the intent to induce, entice, and compel the women to give themselves up to debauchery and to engage in immoral practices (R. 1-2). Petitioners filed a plea in abatement and a motion to quash the indictment (R. 3-6, 9) which were overruled (R. 11). After trial before a jury, petitioners were convicted on both counts (R. 13). Their motion for a new trial (R. 16-22) was overruled (R. 25-26), and on January 15, 1943, they were each sentenced to three years' imprisonment on each count, the sentences to run concurrently (R. 14-16). Petitioner Hans Pete Mortensen was, in addition, sentenced to pay a fine of \$500 on each count (R. 15).

On January 18, 1943, petitioners filed a notice of appeal (R. 30). On January 22, the trial judge advised petitioners' attorneys by letter of his duty under Rule VII of the Criminal Appeals Rules to require the appearance of counsel before him for directions as to the preparation of the record on appeal, and requested the attorneys to fix a date for the appearance which would suit their convenience (R. 45-46). In response to the

judge's letter, petitioners' counsel asked for information as to the time within which the transcript and pleadings had to be filed in the circuit court of appeals and suggested that the judge fix his own date for the appearance of counsel (R. 46-47). In the temporary absence of the judge due to illness, his secretary wrote to petitioners' counsel on February 1, 1943, specifically calling their attention to Rules VII and IX of the Criminal Appeals Rules (R. 47-48). On February 23, 1943, the judge entered an order requiring the United States Attorney and petitioners' attorneys to appear on February 26, 1943 (R. 32-33). One of petitioners' attorneys appeared on that date (R. 58). On February 27, 1943, petitioners filed a motion for an extension of time to settle and file a bill of exceptions (R. 42). This motion was denied on the same date on the ground that no bill of exceptions had been settled and no extension of time granted during the period of thirty days following the filing of the notice of appeal (R. 42-43).¹

Thereafter, petitioners filed an application in the circuit court of appeals for leave to settle and file a bill of exceptions (R. 53-76); this application was also denied (R. 77).

In an affidavit filed in support of the application to the circuit court of appeals, one of petitioners' attorneys stated that the object of the ap-

¹ The thirty-day period expired on February 24, 1943.

plication was to present the evidence relevant to petitioners' contention that the transportation proved at the trial did not fall within the interdiction of the Mann Act (R. 58). He stated that the transcript of the testimony would show that the two women named in the indictment were employed at petitioners' rooming house in Grand Island, Nebraska, and carried on prostitution therein; that when petitioners planned to visit Salt Lake City by way of Yellowstone National Park, the two women volunteered to accompany them in order to see the western scenery; that no acts of prostitution or solicitation occurred during the trip; and that after returning to Grand Island the women renewed their activities as prostitutes at petitioners' house (R. 59).

In order to assure itself that its prior denial of petitioners' application for an extension of time to settle and file a bill of exceptions would not result in a miscarriage of justice, the circuit court of appeals allowed petitioners' attorneys to submit a transcript of the evidence without any formal filing thereof (R. 81). The opinion of the court (R. 79-84) was directed to the question whether the return portion of the trip was a transportation in interstate commerce within the purview of the Mann Act. It held that such transportation constituted a crime under the Act and accordingly affirmed the convictions (R. 85), one judge dissenting (R. 84).

ARGUMENT

The principal question petitioners seek to raise here²—whether the return portion of a circular vacation trip is transportation in interstate commerce within the purview of the Mann Act—is not properly before this Court for the reason that petitioners did not procure the settlement and filing of a bill of exceptions setting forth the evidence showing the nature of the trip.

1. Petitioners urge (Pet. 7, 9-11, 12-13; Br. 26-30) that the trial judge and the circuit court of appeals were guilty of an abuse of discretion in denying their motions for an extension of time to present and settle a bill of exceptions. There is no merit in this contention. As shown in the Statement, *supra*, pp. 5-6, no bill of exceptions was settled and filed during the period of 30 days following the filing of the notice of appeal and no extension of time was requested or granted dur-

² Petitioners attack the indictment as duplicitous because it charges transportation, causing the transportation, and aiding and assisting in the transportation (pp. 6, 8, 11 of the amended petition, hereinafter designated as "Pet.," and pp. 10-16 of the brief in support of the original petition, hereinafter designated as "Br."). It is, however, well established that an indictment may properly charge conjunctively in one count the several acts condemned by the statute. *Blain v. United States*, 22 F. (2d) 393, 395 (C. C. A. 8); *Freed v. United States*, 266 Fed. 1012, 1014 (App. D. C.); see also *Crain v. United States*, 162 U. S. 625, 636; *Pines v. United States*, 123 F. (2d) 825, 829 (C. C. A. 8); *Troutman v. United States*, 100 F. (2d) 628, 631 (C. C. A. 10).

ing that period. The trial judge therefore had no authority under Rule IX of the Criminal Appeals Rules to grant petitioners' subsequent application for an extension of time.³ The circuit court of appeals did have such authority,⁴ but in the circumstances of this case its refusal to grant petitioners an extension was not an abuse of discretion and therefore not subject to review.⁵ The attention of petitioners' counsel was specifically directed to the requirements of Rule IX, the language of which is so explicit that there can be no possible claim of misunderstanding. The courtesy of the trial judge in giving petitioners' attorneys an opportunity to fix a date for the appearance of counsel pursuant to Rule VII in no way excuses their failure to follow the clear mandate of Rule IX. They had ample time to settle a bill of exceptions or, at the very least, to apply for an extension of time within the 30-day period following the filing of the notice of appeal. (See R. 72-74.)

2. In order that this Court may assure itself, as did the circuit court of appeals, that no mis-

³ *Ray v. United States*, 301 U. S. 158, 162; *Long v. United States*, 90 F. (2d) 482, 483 (C. C. A. 9), certiorari denied, 302 U. S. 730; *Wainer v. United States*, 87 F. (2d) 77 (C. C. A. 7), certiorari denied, 300 U. S. 669.

⁴ *Kay v. United States*, 303 U. S. 1, 9-10; *Förte v. United States*, 302 U. S. 220, 223; *Ray v. United States*, 301 U. S. 158, 164.

⁵ See *Ray v. United States*, 301 U. S. 158, 166-167.

carriage of justice will result from petitioners' failure to file a bill of exceptions, we shall discuss the question of petitioners' liability under the Mann Act as though the evidence in respect of the nature of the trip were before the Court.

Petitioners contend (Pet. 6-7, 8-9, 11-12; Br. 16-20) that since the initial and terminal point of the trip was Grand Island, Nebraska, the interstate transportation proved at the trial did not fall within the definition of interstate commerce in Section 1 of the Mann Act (18 U. S. C. 397) as transportation "from" one state "to" another. The sole authority upon which they rely is *United States v. Wilson*, 266 Fed. 712 (E. D. Tenn.), in which the court held that the crossing of state lines as an incidental part of a railroad journey from one point within a state to another point in the same state did not constitute interstate commerce under the Mann Act. The *Wilson* decision, however, is not in harmony with the general rule that even the incidental crossing of state lines constitutes interstate commerce,* and, as the court below pointed out (R. 81-83), it is contrary to the interpretation given to the term "interstate commerce" in other cases under the Mann Act[†] and in cases under the National Motor Vehicle

* *Hanley v. Kansas City Railway*, 187 U. S. 617; *Missouri Pacific R. R. Co. v. Stroud*, 267 U. S. 404, 408.

[†] *Corbett v. United States*, 299 Fed. 27 (C. C. A. 9); *United States v. Oriolo*, 49 F. Supp. 226 (E. D. Pa.).

Theft Act,⁹ which contains a similar definition of interstate commerce.⁹

Petitioners also contend that the entire trip was motivated by the desire of petitioners and the women to take a vacation rather than a purpose to transport the women for prostitution and debauchery. They contend that it is unreasonable to draw a distinction between the outward and return portions of the trip. (Pet. 6-7, 9, 11-12; Br. 20-26.) A similar distinction was, however, recognized and approved in *Corbett v. United States*, 299 Fed. 27 (C. C. A. 9), and *United States v. Oriolo*, 49 F. Supp. 226 (E. D. Pa.). Regardless of the vacation motive, petitioners' purpose from the outset was to bring the women back to engage in prostitution. Petitioners were not merely bringing home two women who happened to be prostitutes; they were returning two employees to their work as prostitutes. In these circumstances, the jury could properly find, as they undoubtedly did (see R. 80), that the purpose to have the women engage in prostitution existed at the time petitioners started on the return part of their journey.¹⁰

⁹ *Hughes v. United States*, 4 F. (2d) 387 (C. C. A. 8), certiorari denied, 268 U. S. 692; *United States v. Winkler*, 299 Fed. 832 (W. D. Tex.).

¹⁰ 41 Stat. 324, 18 U. S. C. 408.

¹⁰ In *United States v. Fisher*, 266 Fed. 667 (C. C. A. 4), upon which petitioners rely (Br. 23), the court held that the transportation of a paramour across state lines on a one-

CONCLUSION

The decision below is correct and the case involves no real conflict of decisions and presents no question of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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JANUARY 1944.

day visit to relatives was not transportation condemned by the Mann Act. The decision, however, was based on the general rule that illicit relations following the transportation are in themselves insufficient to establish a violation of the Act. The other cases cited by petitioner (Br. 20-25) are inapposite; they hold merely that the requisite intent must exist prior to the interstate transportation.

